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Supreme Court, U.S.
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No. 95-1419

In The

Supreme Court of the United States

October Term, 1995

THE KIOWA TRIBE OF OKLAHOMA,
Petitioner,

v.

ROBERT M. HOOVER, JR.,
Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM JAMES ROBINSON
Counsel of Record
SHIRK, WORK, ROBINSON & WORK, P.C.
801 Colcord Building
15 North Robinson
Oklahoma City, Oklahoma 73102-5408
(405) 236-3571
ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

May an Indian tribe be sued in state court for breach of a contract involving economic development off reservation?

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STATEMENT OF THE CASE

As noted by the Oklahoma Supreme Court, the note and security agreement at bar were made, executed, and *delivered*. The Petitioners Statement of Case fails to relate that the *delivery* took place off-reservation (R.63).[1]

Of course, black-letter law supports that proposition that delivery is the essence of the contract and constitutes the issuance of the instrument. Delivery is the evidence of the consummation of the contract: see, e.g., 11 Am. Jur. 2d, Bills and Notes, §§269, 270. It is uncontroverted that the transaction:

1. occurred off reservation;
2. is a commercial investment;
3. is between an Indian tribe and a non-Indian;
4. does not involve "Indian land"; and,
5. culminated in a default in the payment of the note by the tribe.

REASONS FOR DENYING THE WRIT

INDIAN TRIBES MAY NOT INVOKE SOVEREIGN IMMUNITY IN ACTIONS TO APPLY NONDISCRIMINATORY STATE LAW TO CONTRACTS INVOLVING ECONOMIC DEVELOPMENT OFF RESERVATION

The Petitioner's reasons for granting the writ ignore those portions of the cases cited which either uphold the right of suit for off-reservation activities of tribes or delimit the invocation of immunity (impunity?).

[1] The trial court acknowledged that "(T)his case does not involve activities on an Indian reservation or on trust lands . . .". (R. 68)

Of particular vitality is that portion of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L.Ed.2d. 114, 93 S.Ct. 1267, where this Honorable Court stated:

> "But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake*, supra, at 75, 7 L.Ed.2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally [411 U.S. 149] been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 US 392, 398, 20 L.Ed 2d 689, 88 S.Ct. 1725 (1968); *Organized Village of Kake*, supra, at 75-76, 7 L.Ed.2d 573; *Tulee v. Washington*, 315 US 681, 683, 86 L.Ed 1115, 62 S.Ct 862 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 72 L.Ed 709, 48 S.Ct. 333 (1928); *Ward v. Race Horse*, 163 US 504, 41 L.Ed 244, 16 S.Ct. 1076 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse*, supra, at 516, 41 L.Ed. 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake*, supra."

In *Organized Village of Kake v. Egan*, 369 US 60, 7 L.Ed.2d 573, 82 S.Ct 562, Mr. Justice Frankfurter opined:

> "But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*." [358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)]

The principles enunciated by the unanimous Court in *Kake*, supra, were extended in *Mescalero*, supra, to the right of a state (New Mexico) to impose a tax on the gross receipts of a ski resort owned and operated by an Indian tribe off reservation.

The sovereign immunity sought by the tribe is more narrow than that desired by the tribe. *Santa Clara Pueblo et al. v. Martinez*, 436 U.S. 49, 56 L.Ed.2d 106, 98 S.Ct. 1670, is most often cited for the proposition that an indian tribe cannot be sued unless it has waived sovereign immunity. Close examination, however reveals that a female member of the Santa Clara Pueblo, a tribe, and her daughter brought the action for declaratory and injunctive relief against the tribe claiming an ordinance of the tribe denying tribal membership to the children of female tribe members who married outside the tribe, while extending membership to the children of male members who married outside the tribe, violated Title I of the Indian Civil Rights Act, 25 USCS §1301-1303. The Court held that the action was barred by the sovereign immunity of Indian tribes.

This is *not inconsistent* with the case cited by the Oklahoma Supreme Court as one of the authorities for its holding, i.e., *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994) cert. denied. ____ U.S. ____ 116 S.Ct. 476, 133 L.Ed.2d 405 (1995), and

the expressions of United States Supreme Court that Indian tribes, while losing powers inconsistent with their dependent, domestic status, retain the powers over tribal membership and tribal lands.

It is interesting to note that the majority, in *Santa Clara*, supra, at page 56, acknowledged that while the tribes are "no longer 'possessed of the full attributes of sovereignty', they remain a 'separate people, with the power of regulating their internal and social relations,'" citing *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079, where at page 323, this Court states:

> "We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their *members* and their *territory* . . .' ". (emphasis added)

Little note has been taken of the syllabus in *Martinez*, supra:

> "Indian tribes are distinct, independent political communities retaining their original natural right in matters of local self-government: although no *longer possessed of the full attributes of sovereignty*, they remain a separate people, with the power of regulating their *internal* and *social affairs*". (emphasis added)

In citing *Oklahoma Tax Commission v. Citizens Bank Pottawatomie Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the tribe ignores Justice Stevens' concurring opinion:

> "Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory".

In the *Lewis* case, supra, the Oklahoma Supreme Court stated that the teaching that:

> "... 'absent governing Acts of Congress, the question has always been whether the state action infringed upon the right of reservation Indians to make their own laws and be ruled by them', does not stand as authority defeating concurrent state jurisdiction *in all civil cases."*

That Court went on to say, in *Lewis,* supra:

> "The U. S. Supreme Court's jurisprudence clearly supports the notion that not every controversy affecting Indians and their lands lies outside state court jurisdiction".

In *Iowa Mutual Ins. Co. v. La Plante,* 480 U.S. 9, 94 L.Ed.2d 10, 107 S.Ct. 971, the complaint stated two causes of action: the first named the owners of a ranch (on the Blackfeet Indian Reservation and members of that tribe) for compensation for personal injuries sustained by an employee on the ranch while employed there and the second alleged a claim for compensatory and punitive damage against an insurance company for bad-faith refusal to settle. The question before the U.S. Supreme Court was whether a federal court may exercise diversity jurisdiction before the tribal court sys-

tem has an opportunity to determine its own jurisdiction. The court, recognizing the concurrent jurisdiction of federal and tribal courts, remanded the case to the tribal court for exhaustion of tribal remedies.

The most that can be said insofar as may be pertinent to this case is the opinion that:

> "Tribal authority over the activities of *non-Indians on* reservation lands is an important part of tribal sovereignty." (emphasis added) 107 S.Ct. 971, 977.

La Plante, supra, cannot be expanded to deny respondent the recovery herein.

The United States Supreme Court has reviewed the tradition of sovereignty and Mr. Justice Rhenquist found that no immunity for off-reservation activities had traditionally been recognized (concurring in part and dissenting in part, in *Washington v. Confederate Tribes of Colville Indian Reservation, et al.*, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069, P. 2093, citing at P.2095, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114, and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129[2].

[2] Mr. Justice Rhenquist also concluded "when tradition did not recognize a sovereign immunity in favor of the Indians, this court would recognize one only if congress expressly conferred one". The theme of this Response is that one cannot pronounce "we're Indian" and, ipso facto a fortiori, have sovereign immunity and be free from state laws and regulation.

IF A CONFLICT BETWEEN JURISDICTIONS EXISTS, IT IS THE CONFLICT OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT WITH THIS COURT'S JURISPRUDENCE ON THE AMENABILITY OF AN INDIAN TRIBE TO STATE COURT JURISDICTION

The "long line" of cases is non-existent.

Santa Clara Pueblo, supra, cannot be said to be a "damage" suit.

Likewise, reliance on *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940), is misplaced. Within the usual framework of the facts of that case, the United States of America, acting through the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasha Nations, filed a claim on behalf of the Indians Nations in a corporate reorganization under §77B of the then Bankruptcy Act. A cross claim was denied. Also involved, however, was Act of April 26, 1906 §18, 34 Stat. at L. 137, 144, 148, chap 1876, in which Congress had made provision for cross-suites against Indian Nations by defendants. After reciting complexities created by "Civil Rules" and the "Conformity Act", the Court stated:

> ". . . we do not pass upon the question of whether the Company defendant has any cross-claim against the Indian Nations, after the satisfaction of the Indian Nations' claim against it or whether, if there is such a claim, owned

> jointly with the corporation, it is a claim the Company may enforce as defendant under §18."

Certainly, the factual circumstances involved with the claim by the United States, through the Superintendent, on behalf of Tribes, require that the decision be confined to the facts of that case.

The effort by the Tenth Circuit, in *Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995), cert. denied, ____ U.S. ____ , 116 S.Ct. 57, 133 L.Ed.2d 21 (1995), to overcome the concurring opinion of Mr. Justice Stevens' in *Citizens Bank Pottawatomie Indian Tribe of Oklahoma*, supra, is sophistic.

His opinion on off-reservation commercial conduct is consistent with the opinion in *Mescalero*, supra, and the cases cited thereon, recognizing the on/off reservation dichotomy.

Moreover, no assertion has been made that the judgment interferes with the tribal self government or the authority of a tribe over its membership.

THIS COURT, NOT THE OKLAHOMA SUPREME COURT, PROVIDED GEOGRAPHICAL BOUNDARIES TO TRIBAL IMMUNITY

In *New Mexico v. Mescalaro Apache Tribe*, 462 U.S. 324, 76 L.Ed 611, 103 S.Ct. 2378, this court stated that "our cases have recognized that tribal sovereignty contains

a 'significant geographical component,'" citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 65 L.Ed.2d 665.

CONCLUSION

For reasons cited above, the writ of certiorari should be denied.

William James Robinson
Counsel of Record of
SHIRK, WORK, ROBINSON & WORK, P.C.
801 Colcord Building
15 North Robinson
Oklahoma City, Oklahoma 73102-5408
(405) 236-3571